

House Foreign Affairs Committee
Tom Lantos Human Rights Commission

Hearing
on
JUDICIAL INDEPENDENCE IN CENTRAL AMERICA

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Co-Chairman McGovern, Co-Chairman Smith, and esteemed members of the Tom Lantos Human Rights Commission:

I appreciate your calling this hearing to focus on threats to the independence of the judiciary and anti-corruption in Northern Central America. The concerns that you have described in announcing this session once more underscore your decades-long concerns for human rights and democracy in the region.

At the outset, let me say that these threats to the independence of the judiciary are not isolated, stand-alone attacks. They are part of a disturbing and dangerous dismantling of democratic institutions in the past decade, not only in some countries of the former Soviet Union, including Poland and Hungary, but also in the region closest to us and, thus, most directly affecting our interests and our security. The recent arrests of four Nicaraguan presidential candidates, the beating of one and the incommunicado status of others and the willingness of the Sandinista controlled courts to uphold the barring of opposition political parties from the coming election is among the worst recent examples of corruption, authoritarian drift and human rights abuse in the Americas.

We had hoped in the aftermath of the Central American conflicts and the end of the Cold War that those countries would have embarked on a steady path toward greater justice and increased economic opportunity. And we had seen important progress.

To some degree, that progress rested on activist [civil society organizations](#) determined to bring about change in their countries and in their futures, to courageous individuals willing to stand up to elite and criminal threats and to innovative international anti-impunity bodies, the International Commission Against Impunity in Guatemala (CICIG), the Mission to Assist in Combating Corruption in Honduras (MACCIH) and the International Commission Against Impunity in El Salvador (CICIES) that the U.S., EU and other governments helped finance.

Sadly though, recent events have shown that those few who traditionally benefited from closed economies, weak governance and corrupt influence believe they can reverse that progress.

First, they went after the international [anticorruption organizations](#)—despite clear evidence of important successes—not perfect to be sure—but quite breathtaking in historical terms. Unfortunately, when that occurred, the US government failed to react forcefully.

Take CICIG as an example: The [results](#) are impressive:

- Justice reform activities supported by CICIG [contributed](#) to a 5 percent annual decrease in Guatemala's murder rates and a fourfold increase in convictions.
- CICIG worked with the Prosecutor General's Office (MP) to take down around 60 complex criminal networks that operated from municipal levels coercing, co-opting, and corrupting official action.
- CICIG helped the MP to investigate and prosecute 100 high impact cases, indicting 660 individuals of which, as of last year, 310 were convicted. A dozen of the highest impact cases are still pending.
- Between 2012 and 2018, the MP recovered \$30 million, 158 vehicles, 86 properties stolen from the government—all now being used to bolster Guatemala's government capacity.
- In 2015 alone, some \$535 million was estimated to have been lost through corruption, including the customs fraud known as "La Linea" where an estimated \$120 million in customs dues went missing, some going to former president Otto Pérez Molina and his vice president Roxanna Baldetti. Both were prosecuted and the latter was convicted and sentenced to 15 years in prison.
- Perhaps the most significant impact took place in changing public appreciation for the work of the MP and the rule of law. CICIG and the MP investigations resulted in the indictment and/or conviction of three presidents, a vice president, a supreme court magistrate, political party officials, cabinet ministers, prison officials, police and army officers, and economic elites.
- Public perception in Guatemala no longer believed ["untouchables"](#) could never be punished for criminal acts.

Next, the corruptos went after civil society organizations, introducing laws—originally enacted in Russia—to restrict NGO functioning and raise criminal charges against their staff. And they are doing the same with independent and investigative journalists.

Finally, they are attacking the system of justice directly; criminal court judges; appellate and high court justices and anti-corruption prosecutors.

The current Administration of President Joe Biden and Vice President Kamala Harris and a bipartisan majority of the Congress recognize that corruption is linked to the violence of transnational organized crime. Those factors combine to constitute directly and indirectly some of the most significant drivers of migration. They undermine rule of law and, as the World Bank and every development agency has warned, discourage investment, and put economic opportunity and growth further out of reach. In Central America alone, some \$13 billion is [estimated](#) to be lost to corruption each year. UN Secretary General Antonio Guterres [stated](#) corruption costs countries at least 5 per cent of global GDP each year.

I am pleased that the Biden Administration, as part of its [designation](#) of corruption as a national security priority, just [announced](#) a joint task force on anti-corruption during the Vice President's trip to Guatemala. It can potentially support investigations, prosecution and conviction of corrupt actors, in the region, using financial intelligence and other forensic methodologies.

Even before COVID and its exacerbation of economic misery among the most vulnerable in Central America, the pressures to flee their homes and villages were growing. As studies by [CSIS](#) and other think tanks have shown, the belief that their governments do not protect them against cartels and gangs but in fact are controlled for the benefit of a few make migrating seem the lesser evil.

When they see honest judges being pilloried and deposed, and brave attorneys general threatened and forced into exile, why should they risk remaining in communities where those charged with enforcing the law are complicit with the ones endangering their families?

Claudia Paz y Paz has been doing positive work since leaving Guatemala after serving as Prosecutor General. But she should be in Guatemala, not forced to leave her country. Nor should her successor, Thelma Aldana, nor their colleague, Douglas Melendez of El Salvador have to be given asylum because of death threats and baseless criminal charges.

No wonder that the average Central American feels real fear.

"We all know most people like being at home. They like being where they grew up," Vice President Harris [said](#). "... So we have to ask, 'Why do people leave that?' And usually they leave because there is a lack of opportunity or it is just not safe. And so my area of focus on the Northern Triangle is to deal with some of those issues."

Two weeks ago, in her [Call to Action](#) to "sustainably address the root causes of migration by promoting economic opportunity", Vice President Harris stated, "Our comprehensive strategy to address the root causes of migration will involve significant commitments of U.S. government

resources to support the long-term development of the region—including efforts to foster economic opportunity, strengthen governance, combat corruption, and improve security.”

In the short-term, given the realities, more legal opportunities for migration and asylum from those countries also need to be provided. But as a long-term strategy, the Vice President laid out the essential objectives. Unfortunately, we are witnessing new and more elaborate obstacles thrown up almost daily.

The State Department recently [described](#) high government officials in the Northern Triangle who engage in corruption for their personal economic benefit and who do the bidding of those who bribe them to remain power.

The most recent examples of these threats against the independence of the judiciary in the past months have occurred in [El Salvador](#) and [Guatemala](#).

In El Salvador on May 1, the first day in its new session the country’s national legislative body abruptly fired the members of the constitutional court and the Prosecutor General and then replaced them. The first action to dismiss the justices was, according to every expert, a violation of international due process norms and standards which [provide](#) “that judges may be dismissed only on serious grounds of misconduct or incompetence in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.” UN High Commissioner for Human Rights Michelle Bachelet noted that these failures constitute “a breach of international human rights law and a direct attack on judicial independence.”

The second action taken by the Assembly was to appoint, in direct violation of the country’s own constitution and laws, new members to the constitutional court and a new Prosecutor General without even the most token procedure. No candidates were nominated, no independent vetting of nominees took place, no hearings were held, no examination of past conduct or qualifications was made public. Instead, the individuals tapped by President Bukele and his party, Nuevas Ideas, were selected, confirmed and sworn in virtually in a single afternoon.

It is no wonder that both UN High Commissioner and the UN Secretary General [urged](#) El Salvador to comply with their obligations under international law, to restore the rule of law and the separation of powers.”

The Inter-American Commission on Human Rights cited Article 3 of the [Inter-American Democratic Charter](#): “...essential elements of representative democracy include, among others...the separation and independence of the branches of government.”

That Article and its reflection in the constitutions of virtually every country in the hemisphere draw upon historical understanding dating to Hamilton's argument for an independent judiciary in [Federalist 78](#). "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice Without this, all the reservations of particular rights or privileges would amount to nothing."

As was noted by Hamilton and has been incorporated into the UN's [Basic Principles](#), the two critical elements guaranteeing judicial independence are selection and tenure:

"In all instances, the selection process should be on the basis of merits, objective, non-discriminatory, transparent and not beholden to political party or ideology. And the tenure of justices should be guaranteed tenure until a mandatory retirement age or the expiry of their term of office, and removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. The latter should be the result of established standards of judicial conduct and with independent review of the decisions."

All of those standards were violated in El Salvador. The new Prosecutor General, whose appointment was clearly illegitimate, also announced last week that he is dissolving the agreement with CICIES, using as pretext the OAS Secretary General's controversial reported naming as advisor the former ARENA mayor of San Salvador, Ernesto Luis Muyschondt. Muyschondt was under investigation and the Secretary General's decision seems unwise to say the least. However, it does not justify removing a body which actually had started to make inroads on corruption in El Salvador in tandem with the previous Prosecutor General.

Let me turn to Guatemala. To a significant degree, the reversal of progress towards strengthening the rule of law began with the ousting of CICIG in 2019 by then President Jimmy Morales, who was himself then and remains now, the subject of corruption investigations.

From that moment forward, those in the Guatemalan private and political arena known as the [Corrupt Pact](#), hearing little objection from the White House, undertook a campaign to roll back the progress that had been made by CICIG. When it left, its legacy rested with FECCI, the special prosecutor against impunity unit in the prosecutor general's office, the high risk courts which heard those cases and the constitutional court justices who time after time acted to preserve the rule of law. Now all those key institutions are under attack.

In Guatemala, the naming of new members to the Supreme Court and to appellate courts was to have taken place more than a year ago. On May 6, 2020, the Guatemala Constitutional Court directed the Prosecutor General's office, (MP) which had undertaken an investigation of bribery

and other criminal conduct by candidates seeking appointment to the Supreme Court, to present the names of those violators to the Congress. It directed the Congress to block any of those individuals from becoming justices. The MP issued its [report](#) with a list of some 20 individuals who had engaged in corrupt conduct. The Congress essentially ignored that order and in fact some of those candidates still could be named, since the process of naming the 13 Justices and 185 appellate magistrates has not been completed. The flawed process was spelled out in a [report](#) by the ABA and in the annual human rights [report](#) submitted this year by the State Department.

The Inter-American Commission on Human Rights also challenged the [threat](#) to the independence of the judiciary and the Guatemalan Congress' failure to abide by the MP decision as violating international law. Instead, the Congress attempted to impeach the four justices of the constitutional court who had voted in favor of the MP report.

The 2020 State Department Human Rights report for Guatemala stated, "The existing selection process for the election by the congress of 13 Supreme Court and 135 appellate court magistrates suffered widespread manipulation of selection committees by politicians, judicial operators, and other influential citizens, resulting in a judiciary that lacked full independence."

Underscoring the corruption surrounding naming of justices, six weeks ago the [United States](#) imposed "sanctions on—Gustavo Adolfo Alejos Cambara and Felipe Alejos Lorenzana, respectively—for their role in corruption in Guatemala" specifically interfering ... "with the judicial selection process for appointing magistrates to Guatemala's Supreme Court of Justice (CSJ) and Court of Appeals. Gustavo Alejos served as chief of staff for the 2008-2012 Alvaro Colom presidential administration, and Felipe Alejos is an elected delegate to the Congress of the Republic of Guatemala for the 2020-2024 term. Together, they reportedly facilitated payments to congressional representatives and judges in an attempt to influence the selection process for magistrates to both courts and to secure favorable judicial rulings that would protect Gustavo Alejos—as well as CSJ judges—from current and future corruption prosecutions."

The sanctions were imposed under Executive Order 13818 implementing the [Global Magnitsky Human Rights Accountability Act](#) and targets perpetrators of serious human rights abuse and corruption around the world. These sanctions also reinforce actions taken last year by the U.S. Department of State to publicly designate both individuals, and their immediate family members, under Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act due to their involvement in significant corruption.

In a detailed [report](#), supported by the Heinrich Boll Foundation, the Myrna Mack Foundation showed that judicial nominating commissions in Guatemala in 2020 were [mechanisms](#) for favoritism and bias in the selection of judges. They were set up in ways that permitted interest groups, politicians, criminals and military officers to obtain their desired judges. The same process

was investigated as far back as 2014 and charges were filed by the Prosecutor General's office with the support of CICIG against the participants in what were called "comisiones paralelas." Last year the Prosecutor General's office found the same corrupt practice and brought new charges.

And now we come to this year's similarly tainted and highly politicized [process](#) for choosing candidates to the Constitutional Court, which had been the bulwark against the Guatemala's institutionalized corruption in the recent past.

The candidates approved by the Congress include individuals with questionable records. The one clearly qualified and thoroughly vetted justice who had earned the [applause](#) of Guatemalan and international observers, Gloria Porras, was barred by the Congress from taking her seat for a second five year term, even though she was legally selected for that post by the country's Supreme University Council. That action was been denounced as a violation of Guatemala's constitution because the Congressional authority was solely ministerial, to swear in those selected. Its action was termed a direct threat to the independence of the judiciary by the UN Special Rapporteur on [Independence](#) of the Judiciary Diego Garcia Sayan. Justice Porras was [received](#) by the Vice President Harris a few weeks ago prior to her current trip to Guatemala.

One hopes that the Vice President might have been able to convince President Giammattei that Justice Porras' should be sworn into her rightful position on the constitutional court

Now briefly let me just note that in both [Honduras](#) and [Nicaragua](#) the direct threats to the independence of the judiciary are not new phenomena. In Honduras, the courts have been agents of the majority political parties and enforcers of the "untouchables" for a decade at least. In Nicaragua, ever since 2006, Daniel Ortega has increased control over the various judicial bodies, whose decisions have allowed multiple terms in office and been complicit in human rights abuses by state authorities increasingly over recent years. In Nicaragua as well, the electoral [tribunal's](#) rubber-stamping of actions barring opposition parties and candidates demonstrates how the lack of an independent judiciary compromises democracy itself.

What can be done in response to these events? In technical terms, there are a series of procedures and measures adopted internationally through various human rights covenants, and incorporated into the [UN Basic Principles on the Independence of the Judiciary](#), which go back again to the issues of selection and tenure. In many ways, again, they include requirements that we would see as familiar in our own selection of judges and justices.

I have included links to [ABA](#) and [Due Process of Law Foundation](#) reports that include those mechanisms which I would summarize as follows:

1. Establish transparent independent, merit-based selection processes.

2. Insure that the Congress has access to the candidates' past records, assets and financial records.
3. Provide for public hearings and an opportunity for witnesses to offer testimony for or against particularly with reference to information regarding integrity and potential conflict of interest.
4. Allow independent expert analyses of comparative qualifications to be incorporated into the proceedings.
5. It would be useful to have reviews by competent independent international experts—for instance the UN Special Rapporteur on the Independence of the Judiciary or named by the UNHCHR, the Inter-American Commission or Inter-American Court of Human Rights.

Legislative reforms were offered by CICIG, MACCIH and civil society organizations in the past. However, elite power structures blocked their adoption.

Given our government's views that corruption and the absence of the rule of law enable transnational criminal organizations to flourish, encourage migration and endanger any hope for economic development, what more can the Biden Administration and the Congress do:

First, make commitment toward the rule of law a fundamental benchmark for the nature of our partnership with those governments, including on substantial bilateral economic, financial and security cooperation beyond humanitarian assistance. In that regard, I think the Administration should establish an inter-agency body focused not solely on human rights but also on corruption and the rule of law when deciding on cooperation.

Second, fully support those civil society organizations in those countries which have demonstrated non-partisan focus on justice, the rule of law and anti-corruption.

Third, seek to ensure that the International Monetary Fund, World Bank, Inter-American Development Bank and Central American Bank for Economic Integration incorporate those concerns into their own negotiations on budget, macroeconomic and private sector lending. Where our government has knowledge of private businesses that engage in corruption, we should bar them from investing here or benefiting from our private sector lending and provide that information to the multilateral banks development financing arms to bar those companies and individuals from receiving their loans as well.

Fourth, engage our diplomatic energy to promote those objectives bilaterally and multilaterally through our presence in the OAS and the UN.

Finally, where government institutions, private sector organizations and civil society groups are pursuing positive steps toward strengthening the rule of law and anti-corruption, we should do everything we can to empower and support their efforts.